

## OPINION SUMMARY

### MISSOURI COURT OF APPEALS EASTERN DISTRICT

STATE OF MISSOURI,	)	ED97047
	)	
Respondent,	)	Appeal from the Circuit Court
	)	of the City of St. Louis
v.	)	
	)	Honorable John J. Riley
JERRY OUSLEY,	)	0922-CR05977-01
	)	
Appellant.	)	Filed: November 20, 2012

Jerry Ousley (Defendant) was convicted by jury of forcible rape under Section 566.030, RSMo. (Cum. Supp. 1998), and sentenced to fifteen years in the Missouri Department of Corrections. He appeals, arguing the trial court abused its discretion by excluding two of his witnesses as a sanction for untimely endorsement, and in the alternative, by excluding the witnesses as surrebuttal evidence. Second, Defendant argues the trial court abused its discretion by not permitting his counsel to ask during voir dire whether the venire panel would consider the possibility that two teenagers had consensual sexual intercourse. Finally, Defendant argues the trial court committed plain error in instructing the jury by failing to use an applicable Missouri Approved Instruction (MAI).

AFFIRMED.

Division Five Holds: The trial court did not abuse its discretion in initially excluding Defendant's witnesses as a discovery sanction; but the rules of discovery do not apply to surrebuttal, and trial court should have analyzed anew whether Defendant was entitled to offer the witnesses in light of the State's rebuttal evidence, regardless of the prior sanction. However, the trial court's error was insufficiently prejudicial to warrant reversal. Defendant's proffered voir dire question did not improperly reveal evidence to the jury or seek an improper commitment, but Defendant has not shown he was prejudiced by the trial court's limitation of voir dire. The trial court's verdict director conformed to the substantive law, thus its failure to include MAI-CR 3d's mental state element did not result in manifest injustice.

Opinion by: Gary M. Gaertner, Jr., C.J.  
Lawrence E. Mooney, J., and Robert M. Clayton III, J., concur.

Attorney for Appellant: Roxanna A. Mason  
Attorney for Respondent: Timothy A. Blackwell